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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1973

PACIFIC HANDY CUTTER, INC., and DONALD PACE, also known as DON PACE,

Appellants,

vs.

CITY OF SOUTH EL MONTE, a Municipal corporation, JOSEPH BUSCH, District Attorney of the County of Los Angeles, and the MUNICIPAL COURT OF THE COUNTY OF LOS ANGELES, EL MONTE JUDICIAL DISTRICT,

Respondents.

PETITION FOR WRIT OF CERTIORARI

APPEAL FROM
THE DECISION OF THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION TWO

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Opinion of the Court of Appeal, filed December 13, 1973

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A. OFFICIAL AND UNOFFICIAL REPORTS

This is an appeal from a decision of the California Court of Appeal, Second Appellate District, Division 2, dated December 13, 1973, which was unreported. The decision of the Court of Appeal entitled Pacific Handy Cutter vs. City of South El Monte sustained the decision of the Superior Court

of Los Angeles County. The decision of the Court of Appeal is appended hereto as Appendix "A".

B. JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 United States Code, §1257.

The date of judgment sought to be reviewed is December 13, 1973.

A petition for hearing to the Supreme Court of the State of California was made and was denied.

C. QUESTIONS PRESENTED FOR REVIEW

The major question presented for review herein is whether or not a governmental entity may be estopped by reason of its conduct or misrepresentations when those misrepresentations cause one to act in reliance thereon. The facts material to consideration of the questions presented are as follows:

Pacific Handy Cutter, the appellant in this action, is a corporation involved in

light manufacturing. Early in 1967, while Pacific Handy Cutter was contemplating moving its main manufacturing plant to another area, its Executive Vice-President, Donald Pace, entered into some discussions with City Officials of the City of South El Monte.

During the course of the discussions, Mr. Pace advised the officials of the City of South El Monte, particularly Mr. Larson and Mr. Lawson of the Planning Department, that it would be necessary for him to have adequate parking for his facility and that the facility at 2454 North Chico did not have adequate parking.

A lot located to the rear of the premises on North Chico could be used as a parking lot if zoning and a conditional use permit or variance could be granted. Pacific Handy Cutter was willing to purchase the lot if assured of zoning.

The City of South El Monte officials assured Mr. Pace that the requisite zoning or variances would be granted so that he could use the premises to the rear of Chico for a parking lot. In reliance upon such

assurances, Pacific Handy Cutter did remain at 2454 North Chico, and proceeded to purchase the premises described as 2455 Adelia which are located to the immediate rear of the manufacturing plant on North Chico. Thereafter, the house on the premises on Adelia was torn down and a zoning application was made to the City for a variance. The City approved the application in its Planning Commission and Planning Department, but at the time the application came up for hearing in the City Council on appeal from members of the community, community pressures forced the City to reject the zoning application on June 8, 1967. Pacific Handy Cutter was, therefore, left with a worthless vacant lot, no parking lot, and the retention of its facilities in the City of South El Monte without satisfactory parking.

The Adelia lot remained vacant until 1971. Early in 1971, Pacific Handy Cutter acquired another light manufacturing company called Kwikmrk. Pacific Handy Cutter decided it was necessary to consolidate the manufacturing process of both entities in one place. The physical plant on Chico was suitable, but the parking was already

overloaded and could not accommodate additional cars. Accordingly, Pacific Handy Cutter looked elsewhere for space and planned to move out of South El Monte. Mr. Pace advised Messrs. Lawson and Larson of the proposed move due to the lack of parking.

Thereafter, both Messrs. Lawson and Larson in the capacities of agents and employees of the City of South El Monte advised Pacific Handy Cutter that it would be satisfactory for Pacific Handy Cutter to construct a parking lot on the premises on Adelia and that no problems would occur insofar as zoning or criminal prosecution were concerned. Specifically, Pacific Handy Cutter was told (a) to go ahead and build the parking lot; (b) to put up a block wall to make it as far back from the street as possible to make the parking lot as attractive as possible and to take the situation step by step; (c) to build the wall without obtaining any permit or permission from the City of South El Monte, that there would be no permits required; and (d) to go ahead and park cars on the parking lot when completed and that Pacific Handy Cutter would not be bothered by anyone from the

City of South El Monte for parking on the lot.

Based upon the above representations, Pacific Handy Cutter (1) abandoned all further efforts to locate additional facilities for Kwikmrk and Pacific Handy Cutter; (2) moved all facilities of Kwikmrk over to Pacific Handy Cutter's facilities on North Chico; and (3) constructed a parking lot on Adelia at a cost of $7,000.

Commencing in November, 1971, Pacific Handy Cutter began to receive a series of letters from the City of South El Monte advising it that the use of the parking lot on Adelia was an illegal use and Mr. Pace and Pacific Handy Cutter were cited by the City of South El Monte for zoning violations.

On or about August 2, 1971, Pacific Handy Cutter sold to El Monte Properties, both the Chico and Adelia properties and entered into a long-term lease with El Monte Properties. The lease was premised upon the understanding Pacific Handy Cutter had that adequate parking would be accessible and usable on Adelia. The lease is for a period of ten years and Pacific Handy

Cutter is bound under the terms of the lease to the rent, whether or not there is sufficient parking or not.

After filing of the criminal damages, appellants immediately sought to obtain an injunction against the City and the enforcing agencies, prohibiting criminal prosecution and also sought a Writ of Mandate to compel use of the Adelia lot as a parking lot for the terms of the lease.

At the hearing for the preliminary injunction, the general demurrer of the City of South El Monte was sustained without leave to amend and an order of dismissal was duly entered and appealed from.

D. QUESTIONS PRESENTED BELOW

The Federal questions sought to be reviewed insofar as they are based upon the doctrine of fundamental fairness and due process were raised at all stages of the proceedings, including the Points and Authorities filed in the Superior Court, the Brief filed in the Court of Appeals, and the Petition for Hearing in the California Supreme Court. The following

quotations appears in each of the above Points and Authorities and Briefs:

> "In this case the enforcement of the criminal proceedings against these defendants when they have been induced into acting as they did by the representations of the city would be unjust and inequitable and a violation of their rights under the due process clause of the constitution calling for fundamental fairness in dealings between the city and its public."

E. REASONS FOR ALLOWANCE OF THE WRIT

In this present stage of development of the relationship between governmental entities and their citizens the concepts of fundamental fairness play an important part. As the statement of facts presented herein indicates, this petitioner was misled by responsible officers of the City of South El Monte into an intolerable situation whereby it subjected itself to criminal prosecution and severe economic detriment.

There is no overwhelming or overriding public interest that requires the result which the lower courts have sustained. The concept of fundamental fairness inherent to the due process clause of the United States Constitution requires that the city be estopped from prosecuting and persecuting this appellant.

Respectfully submitted,

LAWRENCE TEPLIN

Attorney for Appellants

Not to be Published

RECEIVED
Dec 14 1973
Cox, Castle,
Nicholson & Weekes

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION ONE

PACIFIC HANDY CUTTER, INC. and DONALD PACE aka DON PACE, Plaintiffs and Appellants vs. CITY OF SOUTH EL MONTE, JOSEPH BUSCH, District Attorney of the County of Los Angeles, and the MUNICIPAL COURT OF THE COUNTY OF LOS ANGELES, EL MONTE JUDICIAL DISTRICT, Defendants and Respondents	Civil No. 41698 (Sup. Ct. No. 42224)

APPEAL from a judgment of the Superior Court of Los Angeles County. Robert A. Wenke, Judge. Affirmed.

Cox, Castle, Nicholson & Weekes and Lawrence Teplin for Plaintiffs and Appellants.

James A. Nicklin, City Attorney, City of South El Monte, Burke, Williams & Sorensen, John H. Larson, County Counsel, Robert B. Reagan, Deputy County Counsel and Royal M. Sorensen, for Defendants and Respondents.

This is an appeal from a judgment of dismissal entered after the trial court sustained defendants' general demurrer to plaintiffs' complaint without leave to amend

The following are the ultimate facts pleaded in the single cause of action of the complaint (which we are required to accept as true [Isrin v. Superior Court, 63 Cal.2d 153, 155; Kliener v. Garrison, 82 Cal.App.2d 442, 445]). Plaintiff Pacific Handy Cutter (hereinafter referred to as Pacific) is a corporation which conducts light manufacturing on premises located in defendant City zoned for industrial and manufacturing uses. Early in 1967 Pacific desired to acquire additional parking facilities and, because no land was available for this purpose in any adjacent area similarly zoned for industrial and manufacturing uses, considered the acquisition of a residential lot located on another street

in the rear of its premises. Pacific thereupon contacted John Lawson, Planning Director of defendant City, and Lyle Larson, a member of City's Planning Commission, and discussed with them the prospects for obtaining an appropriate zone variance or use permit whereby Pacific would be permitted to utilize the residential lot for parking facilities. Both of these individuals assured Pacific that "there would be absolutely no question or problem in obtaining appropriate zoning variances or use permits"; and "based upon the above assurances and statements, Pacific . . . was induced to and did purchase" the residential property. Pacific thereafter made application for a variance and such was approved by City's zoning commission, but subsequently "on appeal by a group of dissident property owners in the immediate area, the appeal was sustained by the City Council and Pacific . . . was not allowed to use the lot for parking. Thereafter, from 1967 to and including part of 1971, the lot was simply a vacant lot and had no use to it whatsoever."

Early in 1971, Pacific acquired another manufacturing company and decided to consolidate both businesses onto one location. Pacific's manufacturing facilities located in defendant City were deemed suitable for this purpose except for a lack of parking space; in the latter respect Lawson and Larson now ". . . advised Pacific . . . that it would be satisfactory for Pacific to construct a parking lot on the [residential] premises . . . and that no problems would occur insofar as zoning or criminal prosecution were concerned." Based upon these representations, ". . . Pacific . . . was induced to and did abandon all further efforts to locate additional facilities . . . and constructed a parking lot on the [residential premises] at a cost of $7,000. Had the foregoing representation not been made, Pacific . . . would not have remained in South El Monte nor constructed the parking lot and allowed its employees to park thereon. . . . Commencing in November, 1971, Pacific . . . began to receive a series of letters from the City of South El Monte advising it that the use of the parking lot . . . was an illegal use." On

or about August 2, 1971, Pacific sold its El Monte real estate, but continued to operate the facilities under a ten-year leaseback agreement. "But for the above representation, Pacific would not have made said lease. . . . As a result of the foregoing conduct, the City of South El Monte is estopped from asserting any violation of the zoning ordinances of the City . . . against the plaintiffs by reason of their use of the subject property as a parking lot."

Subsequently defendant District Attorney brought a criminal action against plaintiffs in defendant municipal court for alleged violation of City's zoning ordinance, titled "People of the State of California v. Pacific Handy Cutter and Donald Pace," number M 75055. This action was still pending at the time the complaint was filed.

In the complaint plaintiffs prayed for an injunction prohibiting the criminal prosecution from proceeding, and for a writ of mandate to compel defendant City to permit Pacific to continue to use the residential property for parking facilities for the duration of the term of its leasehold.

A general demurrer was interposed by all defendants on the single ground that t complaint does not contain sufficient fact to state a cause of action. Relying on certain material sections of the Municipal Code of defendant City,[1] of which it prop erly took judicial notice upon the request of defendants (Evid. Code, § 452, subd. (b City of Los Angeles v. Wolfe, 6 Cal.3d 326, 331 fn. 2; Martin v. City of Corning, 25 Cal.App.3d 165, 168 fn. 1) the trial court sustained the demurrer without leave to amend and subsequently entered a judgment of dismissal of the complaint.

On appeal plaintiffs do not contend that under ordinary circumstances they would, or should, be permitted to continue

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1. "9-2-5.2-A-1 . . . The 'R-M' [residential] Zone is established to provide for the development of multiple family dwelling in a suitable residential environment. . . No lot or parcel in Zone R-M shall be used for any purpose or in any manner other tha as permitted and specified in this Divisio

"9-2-5.2-B-4 . . . The following uses are expressly prohibited in the 'R-M' Zone, . . .

"Commercial Uses

"Industrial Uses"

the operation of a parking lot on the subject "R-M" zoned residential property immune from any remedial procedure by any of the defendants, including the pending criminal prosecution; they urge, however, that they do state a cause of action in the complaint, for it sufficiently pleads their right to exceptional treatment in that defendants are "estopped" from enforcing against them the limitations and restrictions of the sections of City's Municipal Code by reason of the representations of Lawson and Larson as averred in the pleading.

It is, of course, true that the theory of estoppel may in some instances be invoked against governmental agencies in relation to zoning matters one of the requisites being sufficient averments, which we here find in the complaint, of the following elements: the agency must be apprised of the facts; the landowner must be ignorant of the true state of the facts; the agency must have intended that its conduct be acted upon, or so act that the landowner had a right to believe that it was so intended; and the landowner must rely on the conduct to his prejudice. (See City &

County of San Francisco v. Meyer, 208 Cal. App.2d 125, 132; City of San Marino v. Roman Catholic Archbishop, 180 Cal.App.2d 657, 677.) However, as conceded in appellants' opening brief such estoppel against government agencies is rarely invoked, and only under unusual circumstances (City etc. of San Francisco v. Burton, 201 Cal.App.2d 749, 756; Donovan v. City of Santa Monica, 88 Cal.App.2d 386, 394), and not if to do so would expressly defeat policy adopted to protect the public, as is particularly set out in statute or ordinance.

In Magruder v. City of Redwood, 203 Cal. 665, a criminal action was brought against the plaintiff for maintaining a lumberyard within the environs of defendant City in violation of a city ordinance. While the criminal cause was pending plaintiff brought an action to enjoin further prosecution or other proceeding designed to terminate his operation of the lumberyard. One of the grounds urged by him was waiver and estoppel based on the circumstance, ". . . that as he had received a permit from the trustees [City's governing body] to erect the building in which he conducted his lumber-yard

. . . the board of trustees thereby repudiated and violated the ordinance and are now in no position to enforce the same." (P. 674.) The Supreme Court said at pages 674-675: ". . . That matter, therefore, is resolved down to the question whether the board of trustees by granting a permit to erect the second building . . . which use was contrary to the terms of the ordinance, thereby placed themselves in a position that prevented them from thereafter enforcing the terms of the ordinance which prohibited a lumber-yard from being operated within the residence district. Appellant contends that they have. He cites no authority to support his contention, and we are not seriously impressed with it. We know of no power possessed by a board of trustees that will permit it in any such manner to nullify a legal ordinance adopted by the municipality. An ordinance of a municipality when once legally adopted becomes binding upon all the citizens thereof, officers as well as private citizens, and it is the sworn duty of those officers, charged with its enforcement, to prosecute all violations thereof. This duty is not

a personal duty that can be waived at their will, nor can they be estopped by any action of theirs from the faithful performance of the same. There is no merit in this contention of appellant." (Italics added.)

Likewise in City of Fontana v. Atkinson, 212 Cal.App.2d 499, defendant operated a dairy located within the incorporated area of plaintiff City; he planned additional construction on his premises and for this purpose had specifications drawn up which he submitted to the County Health Department and to City's Planning Department; the director of the latter wrote thereon "'Approved [signed] R. Garrod 7-28-60 City Planning Commission per telephone conversation with City Attorney 7-28-60 10 A.M.'" (P. 502.) Subsequently defendant was issued a building permit for this construction by City's building inspector; nevertheless, immediately after the work was commenced, City issued a "stop" order, but defendant declared his intention to proceed whereupon plaintiff sued for an injunction. On its findings that plaintiff City was barred by estoppel and waiver, the trial court refused to issue an injunction; we reversed

with directions to enter judgment for City; and said on the issue of waiver (pp. 507-508): ". . . [City] Ordinance No. 2110 provides that no nonconforming use shall be altered, extended or restored so as to displace any conforming use. [Citation.] In Western Surgical Supply Co. v. Afflect, 110 Cal.App.2d 388 [242 P.2d 929], it was held that a board or official has no power to waive or consent to violation of penal provisions in the Health and Safety Code and the Business and Professions Code. See also volume 51, California Jurisprudence, Second Edition, Waiver, section 5, page 313, note 19; Caminetti v. State Mut. Life Ins. Co., 52 Cal.App.2d 321 [126 P.2d 165]; Magruder v. City of Redwood, 203 Cal. 665 [265 P. 806]; Lima v. Woodruff, 107 Cal. App. 285 [290 P. 480]; and County of San Diego v. California Water etc. Co., 30 Cal. 2d 817 [186 P.2d 124, 175 A.L.R. 747], where it was held that neither the doctrine of estoppel nor any other equitable principle may be invoked against a governmental body where it would operate a defeat the effective operation of a policy adopted to protect the public. See also volume 1,

American Law Reports, Second Edition, Estoppel--Governmental Bodies, sections 2 and 3, pages 340-341, and cases cited therein." (Italics added.)

Plaintiffs cite numerous cases in their opening brief, but each is entirely distinguishable factually; none relates to a claim of estoppel or waiver invoked against a governmental agency in derogation of any statute, or ordinance, much less a zoning regulation.

Furthermore plaintiffs seek by means of the complaint to enjoin defendants District Attorney and municipal court from proceeding with the criminal prosecution commenced against them. It is settled that an injunction will not issue against prosecuting authorities in the absence of any allegation that the statute or ordinance under authority of which the criminal action is being prosecuted is invalid. (Pitchess v. Superior Court, 2 Cal.App.3d 644, 648; Manchel v. County of Los Angeles, 245 Cal.App. 2d 501, 506-507; Fairchild v. Brock, 88 Cal. App.2d 425, 429.) Plaintiffs cite no case to the contrary.

The judgment is affirmed.

LILLIE, J.

We Concur:

WOOD, P.J.

HANSON, J.